No. 288,
Brf. of Hooper for P. C.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No: 288.

THE OSHKOSH WATER WORKS COMPANY,

PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

No. 288.

THE OSHKOSH WATER WORKS COMPANY,
PLAINTIFF IN ERROR,

vs.

CITY OF OSHKOSH, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ACTION.

By ordinary summons and complaint. (Record, p. 9-12.)

COMPLAINT.

First cause of action. For hydrant rental for third quarter of 1898 on contract made June 18, 1883, by which plaintiff agreed to erect water-works and supply fire hydrants for thirty years, at specified rental payable quarterly. (Record p. 9, 10, 11.)

Second cause of Action. For hydrant rental for third quarter of 1898, on contract made October 31, 1891, by which plaintiff agreed to extend mains and supply certain other fire hydrants at specified rental, payable quarterly. (Record pp. 11, 12.)

DEMURRER TO COMPLAINT.

That it does not state facts sufficient to constitute a cause of action. (Record p. 13.)

Order sustaining demurrer. (Record p. 14.)

Judgment on demurrer dismissing complaint. (Record p. 14, 15.)

Appeal to Supreme Court of Wisconsin. (Record, pp. 7-8.)

Judgment affirmed (Record p. 16) on ground that the action was prohibited by the new charter of the city, chap. 59, Laws of Wisconsin for 1891. (Record pp. 16 to 28. Appendix p. 4.)

By the *former charter* (Chap. 183, Laws of 1883, published April 10, 1883) which was in force at the time of the contract for building works and laying mains, the remedy of plaintiff for breach of contract to pay hydrant rental was an ordinary action commenced by service of summons. (Appendix pp. 1, 2.) Opinion of the Supreme Court of Wisconsin herein. (Record pp. 17 to 28.)

New Charter of 1891 (Note 1) prohibits the claimant from bringing any direct action on the claim, as was his right under the charter existing at the time of the contract, but provides that the claim be as Justice Lyons says, "*filtered through the common council.*" (Note 2.)

It relates not to any general change in practice but only to proceedings against this city.

ERRORS.

The Court erred.

First. In concluding, as a matter of law, that the charter of 1891 did not, so far as it relates to contract of June 18th, 1883, impair the obligation thereof.

Second. In concluding, as a matter of law, that the contract of October 31st, 1891, for extension of the mains was not unconstitutionally impaired by the charter of 1891.

NOTE 1—Sections 4, 5 and 6, sub-chap. 21, sec. 1, 5 and 6, sub. chap. 9 of chap. 5; Laws of 1891. See Appendix pp. 3, 4.

NOTE 2—Shields vs. Appleton, 49 Wis., 125 at 127.

ARGUMENT.

NEW REMEDY SHOULD BE "SUBSTANTIALLY EQUIVALENT"

It is well settled that legislation simply modifying the remedy does not "impair the obligation of the contract;" but where the subsequent legislation limits to a remedy not "substantially equivalent" then it does "impair the obligation of the contract" within the meaning of the constitution of the United States. (Note 3.)

How far remedy may be modified.

In Oatman vs. Bond (p. 28) "That the parties have a substantial remedy according to the course of justice as it existed at the time the contract was made."

In Edwards vs. Kearzey (p. 607) "Substantially to impair and lessen the value of the contract is forbidden by the Constitution." Quoted and approved in many cases in the Supreme Court of the United States and in the State Supreme Courts.

In Green vs. Biddle (p. 76) "If the remedy afforded be qualified and restrained by conditions of any kind * * * the right of the owner * * * is impaired and rendered insecure according to the nature and extent of such restrictions." Approved in Bronson vs. Kinzie.

NOTE 3—Catman vs. Bond, 15 Wis., 20, 25-6-7; Hasbrouck vs. Shipman, 16 Wis., 315, 396; Nelson vs. Rountree, 23 Wis., 367, 371; Green vs. Biddle, 21 U. S., 15; Bronson vs. Kinzie, 42 U. S. 311, 317; McCracken vs. Hayward, 43 U. S., 608, 612; Howard vs. Bugby, 65 U. S., 461; Walker vs. Whitehead, 83 U. S. 314, 318; Tennessee vs. Sneed, 96 U. S., 69; Edwards vs. Kearzey, 96 U. S., 595, 607; Brine vs. Ins. Co. 96 U. S., 627, 637; Seibert vs. Lewis, 122 U. S., 284, 295, McGahey vs. Virginia, 135 U. S., 662; Barnitz vs. Beverly, 163 U. S., 118, 123; Shapleigh vs. San Angelo, 167 U. S., 640, 657.

In Louisiana vs. New Orleans (p. 207) "Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." Approved in Siebert vs. Lewis.

In Siebert vs. Lewis (pp. 295, 299) "Legal equivalent."

In Bronson vs. Kinzie (p. 316) "Provided the alteration does not impair the obligation of the contract." Approved in Barnitz vs. Beverley.

In Bryan vs. Insurance Company (p. 637) "No changes in these laws which seriously interfere with that enforcement are valid."

In Walker vs. Whitehead (p. 318) "Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution * * * It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made."

Is the New Remedy a "Legal Equivalent?"

It remains to inquire wherein and how far this new charter impairs recovery upon the contract or lessens its value; whether or not the substituted remedy is a "legal equivalent" or substantially equivalent.

General Practice.

By the *practice in Wisconsin* actions are easily commenced by the service of summons; and process and pleadings are amendable at all stages of proceedings. (Note 4.) All immaterial errors and variances are disregarded at all stages. (Note 5.)

Note 4—R. S. 1898, secs. 2669, 2670, 2830. See Appendix pp. 5, 6.

Note 5—R. S. 1898, secs. 2669, 2670, 2829. See Appendix pp. 5, 6.

In case there is failure to secure adjudication upon the merits the judgment is no bar to a future action within the period of limitation; in this case six years. The uniform policy is to secure adjudication upon the merits.

This is now the nature of ordinary legal remedies in Wisconsin. It was the nature of plaintiff's remedy when it contracted to build these works and supply these hydrants, and invested its capital in that enterprise.

NEW FILTERING PROCESS.

But *under the new charter* the claimant is forbidden to sue the city. It is directed to present its claim to the common council for allowance, and, in the language of Mr. Justice Lyon "it requires that the claim must, so to speak, be filtered through the common council." (Notes 1 and 2.)

When we attempt the filtering process we are met with an entirely different policy from that relating to ordinary actions. It is held, under this and parallel legislation, that the Court can only get jurisdiction of a claim against a city by exact compliance with all the minute details of the filtering process; that the Court of general common law jurisdiction of the State has no original jurisdiction of the subject matter of claims against cities; that such jurisdiction can only come to it as an appellate court, and then only upon exact compliance with all the details of a tortuous filtering process through the common council; that the Court wherein the actual trial of the contention can first be had acts only as a Court of review, or, in other words, that the only body having original jurisdiction of the subject matter of contentions against a city is the common council of the city. (6)

NOTE 6—Telford vs. Ashland, 100 Wis., 238-9-40; Plano Mfg. Co. vs. Rasey, 69 Wis., 246; Mason vs. Ashland, 98 Wis., 540; Gutta Percha Co. vs. Ashland, 100 Wis., 232, 236-7; Water Works Co. vs. Oshkosh 106 Wis. 83.

Therein, of course, no trial can be had, for it is fundamental that no one can adjudge his own contentions.

Burdens on the Claimants.

The Supreme Court of Wisconsin has held that under this "filtering process" there can be no amendment of the bond, and no new bond (7); that failure to appeal in time forfeits the claim (8); and that no objection for non-compliance with every step of the filtering process can be waived or even cured by proceeding to trial of the appeal upon the merits. (9) That after the 60 days non-action period, the common council cannot reconsider the claim. That it is already wiped out by non-action and failure to appeal from non-action. (10)

Non-Action Period.

Under this charter, non-action for 60 days is equivalent to adverse action, but the time when the period of non-action begins to run is very doubtful, and the doubt must be correctly solved at peril of losing the claim. The charter provides: (section 4, sub-chapter 21.) "That the failure of such common council to pass upon such claim within 60 days after the presentation of such claim shall be deemed a disallowance thereof."

But, when is the "presentation of such claim?" By section 1, sub-chapter 9, it is provided that the claim shall be

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Note 7—Drinkwine vs. Eau Claire, 83 Wis., 428-9-30. Water Works Company vs. Oshkosh 106, Wis. 83.

Note 8—Mason vs. Ashland, 98 Wis., 540; Telford vs. Ashland, 100 Wis., 238; Water Works Company vs. Oshkosh 106, Wis. 83.

Note 9—Telford vs. Ashland, 100 Wis., 238-9-40. Overruling Sheel vs. Appleton, 49 Wis., 125 at 127.

Note 10—Seegar vs. Ashland, 101 Wis. 515.

"filed with the city clerk, who shall endorse thereon * * * and within one week deliver the same to the comptroller for examination." This section further provides that the comptroller shall examine the claim and determine whether it is properly itemized and verified, and if the charges are correct and incurred by the proper authority and "generally determine the correctness of such claim;" and that for this purpose "he shall have the power to swear witnesses and take testimony." After examination, he approves or disapproves in whole or in part, and reports his reasons therefore, and the evidence taken by him to the city clerk to whom the claim is returned to be placed before the council for its action.

This section further provides that "No claim shall be considered by the council, or reported to the committee, until it shall have been examined and reported on by the comptroller;" that the comptroller, having examined the claim and reported thereon to the clerk, "the city clerk shall thereupon place such claims or demands before the proper board or common council as shown by the nature of the claim at the next meeting of such board or common council for allowance." (Appendix pp. 3, 4.)

Under this charter, it seems quite uncertain, until judicial decision, when is "presentation of such claim." Is it when it is "filed with the city clerk," to be by him handed to the comptroller for his action; or when it is returned by the comptroller to the clerk to be by him placed before the council for allowance; or when, after having been acted upon by the comptroller and returned to the clerk, it is by clerk "placed before such board or common council for allowance" under section 1, sub-chapter 9. (Appendix, pp. 3, 4.)

To save the claim, appeal must be taken within twenty days succeeding the sixty days non-action period. If the claimant dates the commencement of the non-action period

at either of these times and appeals accordingly, and the Court does not agree with him, his claim is lost, wiped out. (Oshkosh Water Works Co. vs. Oshkosh.)

APPROVAL OF BOND.

There are twenty days after disallowance, (sec. 6, sub-chap. 21, appendix pp. 4, 5) or expiration of sixty days non-action, (sec. 4, sub-chap. 21, appendix p. 4) in which to appeal. To perfect appeal, as a necessary part of the filtering process, bond for costs must be given "with two sureties to be approved by the city attorney and comptroller." (Sec. 6, sub-chap. 21 Appendix p. 4.) The perfection of this bond, including of course, its approval by the city attorney and comptroller, is necessary to the jurisdiction of the Court. So all the Wisconsin cases hold. Any failure herein, and the claim is lost. Approval of the bond stands on the discretion of the city attorney and comptroller. Under what compulsion do they act? Can a Court substitute its discretion in place of theirs and compel them to approve? Within what time can such action be taken? What protection in case of their absence, or the absence of either of them, from the city? Is ten days a long time for the city attorney to be on a fishing trip, and ten other days a long time for the comptroller? Is twenty days a long time for the sojourn of these officers, or one of them, beyond the jurisdiction of the Court? What protection against their non-action or their caprice or other misbehaviour?

The plaintiff complains that this charter puts it in the power of these hired men, appointed by the common council (appendix p. 2), and subject to removal by the common council (appendix p. 3), to defeat the attempt of any claimant to get a hearing in Court.

Supreme Court of Wisconsin answers this complaint thus:

"But again counsel says, the statutory requirement that the bond be approved by the City Attorney and Comptroller renders it possible for those officers either wilfully or by neglect to exclude him from his remedy in Court. *Whether this be so has not yet been decided.* If the appellant files a good and sufficient bond in compliance with law, it is by no means certain that the Courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion."

But what is a "good and sufficient bond?" Is not that, so far as relates to sufficiency of surety, entirely in the discretion of the City Attorney and Comptroller?

Is there remedy in damages against misbehaving officers? What security is there for payment? What probability that misbehavior will not be condoned as discretion? What are the certain ear-marks of discretion as distinguished from misbehavior?

Bond Signed by City Officer not Good.

There are in this small city 70 to 100 officers. The position of many of them is honorary. Salary one dollar per year. Charter says, "No city officer shall be accepted as surety on any bond * * * made to the city." (Appendix p. 5.) Hence no one of these officers can be a surety on an appeal bond. This fact alone is of little moment. But suppose a bond on appeal signed by one of these officers is approved by the city attorney and comptroller. The claimant supposes his appeal perfected. On discovery of this fact must not the appeal fail and the claim be lost?

As the Wisconsin Supreme Court says herein, "We have held that the preliminary steps are jurisdictional; and that unless complied with the Court fails to acquire jurisdiction of the subject matter; that the various steps are mandatory and cannot be waived by the officers of the city; nor can jurisdiction be conferred by such officers; Telford vs. Ash-

land, 100 Wis., 238; Oshkosh Water Works Company vs. Oshkosh, 106 Wis., 83; that the bond cannot be amended, nor a new bond given, after the expiration of the twenty days. Oshkosh Water Works Company vs. Oshkosh." (Record p. 18)

FORM OF BOND.

Oshkosh is in the Winnebago circuit and on appeal from the common council of that city the case goes to that circuit and to perfect the appeal a bond must be given "conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant in the Circuit Court." (Sec. 6, sub-chapter 21, appendix p. 5.) If the bond recites "Winnebago Circuit Court" instead of "Circuit Court," the appeal fails—there can be no amendment, no new bond—the claim is lost. (11) The approval of the form of the bond by the city attorney, the law officer of the city cannot be adverted to in support of a bond defective in form. (12)

In place of a known, tried, action at law, with liberal rules for amendment, and waiver, and disregard of defects, and right to a new action within period of limitation, under the charter in existence at the time of the contract, we have under the new charter a tortuous filtering process through a mesh of intricacies, wherein any misconstruction of doubtful statutory rules, or misstep of the party, or non-action, or perverse action of officials, is fatal to the claim; and where there can be no amendment, no waiver, no disregard of defects, no estoppel even by trial.

NOTE 11—Drinkwine vs. Eau Claire, 83 Wis., 428-9-30; Stephani vs. Manitowoc, 101 Wis., 59, 64; Water Works Co. vs. Oshkosh, 106, Wis. 83.

NOTE 12—Water Works Co. vs Oshkosh 106, Wis. 83.

This and similar charters have given rise to so much litigation, involving so many new and intricate questions, as to make demand for a new local law book, "Estabrook's Law of Cities."

Where public opinion is inflamed against a corporation, with large capital invested in water works or lighting works, is not the process of filtering a claim through the common council under this charter, in view of these decisions, a very precarious remedy? Is it "substantially equivalent" to the the simple common law action by summons?

ADVANTAGE OF SIMPLICITY.

Mr. Justice Hunt says in Tennessee vs. Sneed (p. 75):

"This remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy and easily tried, and less complicated than a proceeding by mandamus. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter."

Mr. Justice Bardeen, dissenting herein, said:

"The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness, at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and diminish its value as to come within the condemnation of the constitution. I refer particularly to those charter provisions relating to the time when an appeal must be taken, commences to run, and the requirements relating to the giving and approval of a bond. The latter provisions seem to be of especial significance. The appellant must take its appeal, get its bond, and secure the approval both of the city attorney and city comptroller in 20 days or its rights are forfeited. The

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charter contains no provisions regarding the responsibility of the sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If, perchance, one of these officers should be absent from the city during the time the right to appeal is running the appeal is lost." (Record p. 28.)

II.

DELAY.

Under charter of 1883, suit could be commenced immediately on demand. Under charter of 1891 if Common Council choose not to take action, no proceeding can be instituted in Court until 60 days non-action, whenever that may be. Then the claimant may appeal. Then the clerk must make a return of the appeal to the Court, but there is no provision as to when he shall make such return (Sec. 6, sub-chap. 21, appendix pp. 4 5.)

After he makes his return there is, on the part of the claimant, only an account, and on the part of the municipality, only a refusal to pay. This does not make an issue for trial in Court. The Court must direct an issue to be made up.

Certainly a claimant would be fortunate if he procured an issue to be made up in a year after handing his claim to the clerk of the city. This is a special law suspending action for 60 days and thereafter indefinitely, on these claims against this defendant city. As to this existing contract it is unconstitutional for that reason. (13)

NOTE 13—96 U. S., 69.

III.

WITHDRAWAL OF PROPERTY FROM EXECUTION

Under this and similar charters no suit can be maintained upon an allowance. (13) Hence no execution can be had, and no levy upon, or sale of, the property of the municipality. It is all withdrawn from execution as completely as if declared exempt. Under the charter of 1883 judgment could be rendered on non-payment, and execution could be had on which all the property of the city, not especially declared exempt-(appendix p. 1) could be seized and sold. (14) Such withdrawal of property from reach of execution, or denial of right to execution, renders the charter of 1891 void as to then existing contracts. (13)

Object of Change.

As was said by Mr. Justice Shiras in Barnitz vs. Beverly, p. 131. "We are bound to consider the entire scheme of the new statute and to have regard to its probable effect on the rights of the parties."

Mr. Justice Dodge says (Record p. 18.) "This amendment of the charter of Oshkosh was but one of many such amendments to city charters occuring at about that time significant of a marked change of legislative policy with reference to enforcement of money demands against cities."

Respecting the object of this "marked change of legislative policy" Mr. Justice Dodge says in Seegar vs. Ashland (518.) "The legislature has deemed it necessary to throw these burdens on the claimants and restrictions upon the municipal officers in order to protect the public moneys of the municipality."

Protect from what? Evidently from the hand of the Court acting in behalf of the creditor.

Note 14—Secs. 19, 23, 28, 29, 30, sub-ch. 14, chapter 183, laws 1883. Appendix pp. 1, 2. Rev. Stat. 1898, 2982, sub. 16, appendix p. 6.

Burdens thrown upon claimants to protect the public moneys of the municipality from attack through the courts, can hardly be said to be imposed for reformation in practice. This legislation is directed principally against claims arising out of contracts of municipalities with Water Works Companies and Lighting Companies. Most, if not all, of the corporate charters contain provisions for purchase of the plants by the municipality in order to municipal ownership. These facts of current history explain the reason why "the legislature has deemed it necessary to throw these burdens upon the claimantsst * * * in order to protect the public moneys."

The Supreme Court of Wisconsin says this is "a marked change in legislative policy with reference to enforcement of money demands against cities." Adopted in order "to throw these burdens on the claimant."

The same court formerly said that the parties must "have a substantial remedy according to the course of justice as it existed at the time the contract was made." (Ante p. 3.)

This court says "If the remedy afforded be qualified and restrained by conditions of any kind * * * the right of the owner * * * is impaired and rendered insecure according to the nature and extent of such restrictions." (Ante p. 3.)

"No changes in these laws which seriously interfere with that enforcement are valid." (Ante p. 4.)

"Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the constitution * * * It must be left with the same force and effect including the substantial means of enforcement which existed when it was made." (Ante p. 4.)

MOSES HOOPER,

for Plaintiff in Error.

APPENDIX.

Charter of 1883.

In this case the Supreme Court of Wisconsin says:

"At the time of making the contract of June 18, 1883, the city of Oshkosh existed and operated under a charter known as chapter 183 of P. and L. Laws of 1883, the first section of which constituted it 'a municipal corporation by the name of the city of Oshkosh, and by that name capable of suing and being sued in all courts of law and equity.' That charter, sec. 1, ch. VII, provided that moneys 'shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council,' and by sec. 10, ch. VII., 'Any account or demand against the city before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law.' Except for these restrictions upon the payment of money, the city of Oshkosh was subject to suits upon contract liability like any other person or corporation." (Record, p. 17.)

This charter also contains the following provisions:

Sub. Chapter XIV, section 19.

"No real or personal property of any inhabitant of said city, or of any individual or corporation, shall be levied on and sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."

Section 23. "The said city may lease, purchase and hold real or personal estate sufficient for the convenience of the inhabitants thereof, and may sell and convey the same, and they shall be free from taxation while owned by the city."

Section 28. "When the city of Oshkosh deeds or leases any real estate or any interest therein, owned by said city, the party of the first part shall be the city of Oshkosh, and

the person or persons authorized to execute such deed or lease need not be named in the body thereof."

Section 29. "The mayor of said city is hereby authorized, when the common council shall, by ordinance or resolution, for that purpose, describing the real estate and interest to be conveyed, order and direct him so to do, to execute a deed or lease of such real estate, or interest therein belonging to the said city; the said deed or lease shall be signed by the mayor of said city and countersigned by the city clerk, and sealed with the corporate seal of said city, and duly witnessed and acknowledged, as is provided by law for the execution of deeds and leases."

Section 30. "When any such deed or lease is so executed, the city clerk shall attach to such deed or lease a true and attested copy of such ordinance or resolution, and the same shall be recorded by the register of deeds with the said deed or lease, and such copy, so attached and recorded shall be, in all courts of this state, *prima facie* evidence of the authority of such mayor to make and execute such deed or lease."

NEW CHARTER OF 1891.

In 1891 there was enacted a revised charter for the city of Oshkosh, being chapter 59 of the laws of 1891. This charter contains substantially the provisions of section 1 of sub. chapter 1 and sections 1 and 10 of sub. chapter 7 of the charter of 1883. Among other things this charter also contains the following enactments.

Sub. Chapter IV, section 9:

"At the first meeting of the common council or as soon thereafter as may be, there shall be the following city officers appointed by the mayor and confirmed by a majority of all the members of the common council voting in favor of such confirmation: a comptroller, a city attorney, a chief of police and a chief of the fire department, who shall hold their offices for the term of two years." * * *

Section 18. "Every officer elected or appointed to any office may be removed from such office by a vote of two-thirds of all the members of the common council; but no such officer shall be removed except for cause nor unless written charges are preferred against him and an opportunity given him to be heard in his own defense." * * *

Sub. Chapter IX, section 1.

"All claims and demands against the city except for salaries shall be itemized, verified by oath of the claimant or some one in his behalf, and filed with the city clerk, who shall endorse thereon the name of claimant, amount and nature of claim, date of filing and proper number of claim, and within one week deliver the same to the comptroller for examination, who shall examine such claims presented against the city and so delivered to him, whether founded on contract or otherwise, and determine as to each claim whether the same is properly itemized and sworn to, or if on contract, whether the items charged are correct, whether such claim was incurred by proper authority, and generally determine the correctness of such claim. For the above purposes he shall have power to swear witnesses and take testimony. If he does not find any objection to the claim, he shall mark his approval thereon; if he disapproves, or approves in part and disapproves in part, he shall report his reasons therefor, and in all cases he shall report the evidence taken by him. No claim shall be considered by the council or reported to a committee till it shall have been examined and reported on by the comptroller. The comptroller shall so examine said claims and demands and return the same to the city clerk within two weeks after he shall have received them with his report thereon in writing. The city clerk shall thereupon place such claims or demands before the proper board or common council, as shown by the nature of the claim at the next meeting of such board or common

council for allowance; if a claim arising on account of the public parks, before the board of public works; if a claim arising on account of the schools, other than the erection and repair of school buildings and maintenance of school grounds, before the board of education; and all other claims before the common council."

Section 5. "Whenever any claim shall have been disallowed in whole or in part by the comptroller, the claimant may appeal from such action of the comptroller to the common council."

Section 6. "When the common council shall have taken final action upon any claim or demand and shall have disallowed any portion thereof, the claimant may appeal from such action in the manner provided in this act."

Sub. Chapter 21, section 4.

"No action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof."

Section 5. "The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided."

Section 6. "Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council disallowing said claim to the circuit court of the county in which the city is situated, by causing a written notice of such appeal to be served on the clerk of the city

within twenty days after making of the decision disallowing such claim; and by executing a bond to the city in the sum of one hundred and fifty dollars, with two sureties to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant in the circuit court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council with its decision thereon and shall transmit the same, together with all the papers in the case to the clerk of the circuit court of the county. Such case shall be entered, tried and determined in the same manner as cases originally commenced in said court."

Chapter XXIII, sec. 5 provides that "no city officer shall be accepted as surety on any bond, contract or other obligation made to the city."

Secs. 1, 2, 3, 4, 5, 6, 9, sub. ch. IV, sec. 1, sub. ch. X, XI, XII, XIII and XV provide for, in all from seventy to one hundred officers in this little city, many with salary of one dollar per year. Such as school commissioners, park commissioners and cemetery commissioners.

Practice Acts.

Revised Statutes for Wisconsin, for the year '98 contains the following provisions:

Section 2669. "No variance between the allegation in a pleading and the proof shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense upon its merits. Whenever it shall be alleged that a party has been so misled that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just." Same as sec. 33, ch. 125, R. S. 1858.

Section 2670. "When the variance is not material, as provided in the last section, the court may direct the fact to be found in accordance with the evidence or may order an amendment without costs." Substantially same as sec. 34, ch. 125, R. S. 1858.

Section 2829. "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Same as sec. 40, ch. 125, R. S. 1858.

Section 2830. "The court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. * * *" Substantially same as sec. 37, ch 125, R. S. 1858.

EXEMPTION FROM EXECUTION.

Section 2982. Sub. 16, R. S. 1898 specifies what property of a municipal corporation shall be exempt from execution and is substantially same as sec. 1, ch. 89, laws 1858.

Revised Statutes of Wisconsin, 1878, section 2982, sub. 16, exempts from execution the following property: "All fire-engines, apparatus and equipments, including hose, hose-carts and hooks and ladders, belonging to, or which may hereafter belong to, any town, city or village in this State, and which are or may be kept and used for the protection of property in such town, city or village from fire, together with the engine-houses and hook-and-ladder houses for the protection of the same, and the lot or lots on which such engine and hook-and-ladder houses may be situated, when owned by any such town, city, or village; and any lot or lots owned, used and occupied by any such town, city, or village, for corporate purposes."